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Opinion following transfer from Supreme Court

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROGER ADRIAN HERNANDEZ, Defendant and Appellant.	E067112 (Super.Ct.No. RIF1506525) OPINION

APPEAL from the Superior Court of Riverside County. Irma Poole Asberry, Judge. Affirmed in part; reversed in part with directions.

Dawn S. Mortazavi, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton, Adrianne S. Denault and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Roger Adrian Hernandez contacted his live-in girlfriend Jennifer Clark via telephone advising her that he had discovered God's plan for their family. He told her he was going to sacrifice himself and his daughter I.H. (Daughter) to show God how true defendant was to him. Defendant was going to give Clark a gun so that she could shoot him and then Daughter. Defendant was arrested when he arrived at Daughter's school to pick her up.

Defendant was convicted of one count of making terrorist threats (Pen. Code, § 422).[1] It was further found true that defendant had suffered one prior serious and violent felony offense within the meaning of sections 667, subdivisions (a), (c) through (e)(1) and 1170.12, subdivision (c)(1).[2] Defendant was sentenced to six years four months to be served in state prison.

Defendant made one claim on appeal that insufficient evidence was presented to support his conviction of making terrorist threats. We affirmed the judgment in our prior opinion in *People v. Hernandez*, E067112 (Sept. 10, 2018).

On November 20, 2018, the California Supreme Court granted review, vacated this court's decision and the case was transferred back to this court to "reconsider the cause in light of Senate Bill 620 (Stats. 2017, ch. 682)." Senate Bill 620 (S.B. 620) amended subdivision (h) of section 12022.53 to allow a trial court to strike a firearm enhancement in the interests of justice. This court issued an order on November 27,

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] The trial court struck the prior felony conviction within the meaning of sections 667, subdivisions (c) through (e)(1) and 1170.12, subdivision (c)(1).

2018, advising the parties to submit supplemental briefs "limited to matters arising after this court's previous opinion was filed. (Cal. Rules of Court, rule 8.200 (b)(2).)" The parties filed supplemental briefs addressing Senate Bill 1393 (S.B. 1393), not S.B. 620, which amended sections 667, subdivision (a) and 1385, effective January 1, 2019, to permit the trial court to strike a section 667, subdivision (a) prior serious felony conviction within its discretion. (Stats. 2018, ch. 1013, §§ 1-2.) Prior to the amendment, the imposition of a five-year sentence was mandatory and was imposed in this case.

Sufficient evidence supports defendant's conviction of violating section 422. Further, this case is not subject to resentencing pursuant to S.B. 620 because defendant was not convicted of a firearm enhancement. However, defendant's contention that he is entitled to resentencing pursuant to S.B. 1393, and conceded by the People, is well taken. We will remand for resentencing but otherwise affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

A. CURRENT INCIDENT

In October 2015, Clark, three of her children, defendant, and Daughter (who was eight years old) all lived together on Eileen Street in Riverside. Clark explained that she and defendant had been dating for the prior two and one-half years but had experienced problems. Defendant would live with her and then would get drunk and do something that caused her to break up with him. They would take a break and then he would come to back to her.

On October 22, 2015, Clark was at work. Defendant called her several times but she ignored the calls. After several calls, she became concerned there was an emergency

and finally answered. Defendant was very excited. He told her, "Babe, I get it now." He told her, "God gave me his eyes to see. You know I get it." Defendant told Clark that God wanted him to sacrifice himself and Daughter to show God how true he was to him. He told her that her children were like his own kids and they were all going to heaven together. This way they would not have to suffer on earth like he had suffered.

Defendant told Clark he was going to give her a gun and she was going to shoot him and then Daughter. Clark then understood sacrifice, since he mentioned a gun, to be a killing. Clark was afraid because she was worried he would hurt her children or Daughter. Clark was concerned when defendant mentioned getting a gun because he had told her before he could get a gun if he needed it.

Defendant got a call on another line from his sister. He told Clark that he wanted to talk to his sister and tell her everything; defendant hung up. Seconds later, Clark got a text message from defendant's sister. Clark called Daughter's school. Daughter was to be released from school in 10 minutes and defendant was scheduled to pick her up from school. Clark did not want Daughter to be alone with defendant because she did not know what he was going to do. The school advised her to call the police.

Clark called the police and headed to the school. The school kept Daughter hidden in the front office. Defendant arrived at the school. Clark hid from defendant until the police arrived.

Warren Ufondu was a campus supervisor for the Riverside School District. He was on duty at the school that Daughter attended on October 22. Ufondu was made aware of defendant's statements to Clark. Ufondu pulled Daughter from class and hid

her until Clark and the police arrived. When defendant arrived at the school, he came to the office looking for Daughter. He said to Ufondu, "Hey, bro, you know, God sacrificed his son and, you know, I'm thinking about sacrificing myself and—." Defendant stopped talking midsentence. Defendant appeared to Ufondu to be "spacey."

Riverside Police Officer Christi Arnold was a school resource officer and responded to Daughter's school. When she arrived, she spoke with Clark. Clark was frantic and immediately approached Arnold when she arrived. Officer Arnold spoke with defendant. He had no weapons. He insisted he loved Daughter; Clark and Ufondu were lying. He never threatened to harm himself or Daughter. Arnold helped Clark get a restraining order.

B. DEFENDANT'S PRIOR VIOLENT ACTS

Clark was concerned about defendant's behavior when he called her because she was aware of defendant's participation in violent activity in the past. Defendant told Clark that while living in Chicago, about 10 years before, he had been in a gang. Defendant told her he had killed and hurt people. Clark indicated that when defendant got drunk, he became violent. In November 2013 defendant had gotten drunk and said mean things to her. He punched the wall and made a huge hole in the wall. He punched a hole so deep it cut off the power.

A few weeks prior to October 22, defendant had gotten drunk and taken some medication. Clark was mad at him because he was too drunk to drive the children to their activities. They got into an argument. He pushed some groceries off the table hitting one

of Clark's daughters with the food. Clark gathered all of the children and left the house. She went next door and called the police.

Clark calmed down and called off the police. She went to talk to defendant. She told him she believed that he was threatening her. He responded, "I don't make threats. I'm not like your ex. If I pull a gun out on you, I will blow your f-ing brains out." Clark was scared.

Clark told defendant she did not want to be with him anymore and that he needed to leave. Defendant started attending AA meetings at a church and told Clark he wanted to work on their relationship. Defendant began talking about God. He became calmer and peaceful. Defendant told her that he wanted to get married.

Defendant then began to act different. He would not stop talking day and night. He would talk to everyone about their personal business. Defendant told her that God was sending him messages. When Clark confronted defendant, advising him that God speaks through prayer and the bible, defendant got angry insisting that God communicated with him in a different way.

Defendant had never used a gun against Clark. Defendant told Clark that he knew a lot of people in Riverside and that if he needed a gun he could obtain one. She had never seen him with a gun.

C. DEFENSE

Defendant testified that Daughter meant everything to him. He had tattoos on his neck that said "Daddy's Girl" and "[Daughter]." He would never hurt her. He admitted in 2003 he had been convicted of domestic violence against another woman. On October

22, defendant was excited to talk to Clark that he was finally going to give himself to God. He wanted to surround his entire life with God. Defendant wanted the entire family to surround themselves with God.

Defendant indicated Clark exaggerated that he had threatened to shoot her in early October. He came home after drinking and Clark accused him of cheating on her. Daughter started crying at some point. Defendant and Clark got into an argument but he never threatened to shoot her. He admitted he punched the wall during another argument.

Defendant insisted his only statement to Clark over the phone on October 22 was that he wanted to sacrifice himself and Daughter to God. His use of the word sacrifice did not mean to kill, but to devote their lives to God. He did not say he was going to get a gun; Clark was lying. He did not own a gun and did not have access to one. He never told Clark he could get a gun from friends. His life had changed once he went to the AA meeting. Defendant insisted that Clark was lying every time she said he talked about a gun.

DISCUSSION

A. INSUFFICIENT EVIDENCE OF TERRORIST THREAT

Defendant contends the evidence was insufficient to support his conviction of making terrorist threats because his statement, that he would give Clark a gun to kill him and Daughter, was not a threat to commit a crime resulting in great bodily injury and death. Clark could have instead walked away with the gun, not shooting either defendant or Daughter. Further, the circumstantial evidence of Clark's history with defendant did not support the conclusion that defendant intended to threaten Daughter. The

circumstances did not involve defendant drinking or that he was trying to protect Daughter, which were the triggers for his prior violence.

" 'A substantial evidence inquiry examines the record in the light most favorable to the judgment and upholds it if the record contains reasonable, credible evidence of solid value upon which a reasonable trier of fact could have relied in reaching the conclusion in question. Once such evidence is found, the substantial evidence test is satisfied. [Citation.] Even when there is a significant amount of countervailing evidence, the testimony of a single witness that satisfies the standard is sufficient to uphold the finding.' " (*People v. Fuiava* (2012) 53 Cal.4th 622, 711.)

The elements of a criminal threat under section 422 are as follows: "The prosecution must prove '(1) that the defendant "willfully threaten[ed] to commit a crime which will result in death or great bodily injury to another person," (2) that the defendant made the threat "with the specific intent that the statement . . . is to be taken as a threat, even if there is no intent of actually carrying it out," (3) that the threat—which may be "made verbally," was "on its face and under the circumstances in which it [was] made, . . . so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat," (4) that the threat actually caused the person threatened "to be in sustained fear for his or her own safety or for his or her immediate family's safety," and (5) that the threatened person's fear was "reasonabl[e]" under the circumstances.' " (*In re George T.* (2004) 33 Cal.4th 620, 630; *People v. Toledo* (2001) 26 Cal.4th 221, 227-228; see also § 422.)

" '[T]he determination whether a defendant intended his words to be taken as a threat, and whether the words were sufficiently unequivocal, unconditional, immediate and specific they conveyed to the victim an immediacy of purpose and immediate prospect of execution of the threat can be based on all the surrounding circumstances and not just on the words alone. The parties' history can also be considered as one of the relevant circumstances.' " (*People v. Gaut* (2002) 95 Cal.App.4th 1425, 1431; see also *People v. Mosley* (2007) 155 Cal.App.4th 313, 324.)

"A threat is sufficiently specific where it threatens death or great bodily injury. A threat is not insufficient simply because it does 'not communicate a time or precise manner of execution, section 422 does not require those details to be expressed.' " (*People v. Butler* (2000) 85 Cal.App.4th 745, 752.) "[I]t is the circumstances under which the threat is made that give meaning to the actual words used. Even an ambiguous statement may be a basis for a violation of section 422." (*Id.* at pp. 753-754.)

In *People v. Mendoza* (1997) 59 Cal.App.4th 1333, 1340, superseded by statute on other grounds as noted in *People v. Franz* (2001) 88 Cal.App.4th 1442, the defendant told the victim that, " 'you fucked up my brother's testimony. I'm going to talk to some guys from Happy Town.' " (*Mendoza,* at p. 1340.) The appellate court agreed with the defendant that this statement "did not articulate a threat to commit a specific crime resulting in death or great bodily injury." (*Ibid.*) The appellate court concluded, however, that this was sufficient for a violation of section 422, finding, "although appellant's words were ambiguous, did not mention a particular criminal act or give other particulars, a rational juror could have found—based on all the surrounding

circumstances—appellant's words were sufficiently unequivocal, unconditional, immediate and specific to convey to [the victim] a gravity of purpose and immediate prospect of death or serious bodily injury." (*Mendoza*, at p. 1342.)

Here, defendant told Clark that God had told him to sacrifice both him and Daughter to show how true he was to God. Defendant told Clark he was going to get a gun, give it to Clark and she was to shoot both him and Daughter. He wanted the entire family to go to heaven together. Defendant complains that such statement did not rise to the level of a threat to commit a crime resulting in great bodily injury or death. He insists that even if he gave Clark a gun, she could have walked away. This interpretation is not reasonable based on the circumstances.

When defendant called Clark he was excited and wanted to express his newfound devotion to God. He immediately told her he was going to sacrifice himself and Daughter to God to show his devotion. He wanted Clark to shoot him and then Daughter. The jury reasonably could conclude that defendant intended to commit great bodily injury or death on Daughter. Although he expressed a way that the sacrifice could occur, it was reasonable to conclude that defendant would find a way to sacrifice himself and Daughter to God even if Clark did not shoot them. Moreover, defendant told Ufondu that God sacrificed his own son and defendant was going to sacrifice himself, and then abruptly stopped talking. The implication from the statement was that he was going to sacrifice Daughter the same way God sacrificed Jesus, which meant having Daughter die. This was not an expression that he just wanted to be devoted to God. Based on the surrounding circumstances, defendant's statement qualified as a criminal threat.

Further, based on defendant's prior history and his behavior leading up to October 22, there was substantial evidence that defendant's statement was a threat to commit great bodily injury or death upon Daughter. Defendant had a history of violence, including telling Clark he had committed murder, he had punched a wall during an argument, and had been involved in a domestic violence incident with another woman. Defendant also told Clark during an argument that if he pulled a gun on her, he would blow her "fucking" brains out.

Defendant contends these acts of violence were only committed when he was drinking and he was not drinking on October 22. Although alcohol may have been involved in the prior incidents, there was no evidence this was the sole contributor to his violence. Defendant had threatened Clark that if he had a gun, he would use it. Defendant had shown his inability to control himself by punching the wall and throwing food off the table, hitting one of Clark's children.

Further, defendant's behavior in the weeks preceding his statements supported that his statement he was going to sacrifice Daughter was a criminal threat. Defendant had suddenly found God and insisted that God was speaking to him. He wanted the entire family to be devoted to God. He was described as "spacey" on the day of the incident by Ufondu. Defendant continuously talked day and night. He got angry when Clark questioned him about God speaking to him. Based on his behavior, it was reasonable for the jury to conclude that his devotion was deepening and he intended to kill himself and Daughter because of this devotion to God.

Based on the statements made by defendant and the surrounding circumstances there was sufficient evidence of a violation of section 422.

B. RESENTENCING

The California Supreme Court returned this case with directions for this court to vacate our decision and reconsider it in light of S.B. 620. S.B. 620 amended section 12022.53, subdivision (h), effective January 1, 2018, to give trial courts the power " 'in the interest of justice pursuant to Section 1385 and at the time of sentencing, [to] strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.' " (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090.) The amendment to section 12022.53, subdivision (h) does not apply to this case because defendant was not convicted of a firearm enhancement.

Defendant argues in his supplemental briefing that he is entitled to remand for resentencing pursuant to S.B. 1393, which amended sections 667, subdivision (a) and 1385, to allow a trial court to strike enhancements for prior serious felony convictions.[3] Defendant's sentence included a five-year term for his prior serious felony conviction. The People concede defendant is entitled to remand for resentencing.

[3] We directed the parties in our November 27, 2018, order to provide supplemental briefing only on matters occurring after the prior decision was filed in this case. (See Cal. Rules of Court, rule 8.200(b)(2)).) The amendments to sections 667, subdivision (a) and 1385 were effective January 1, 2019, clearly after our prior opinion was filed.

Effective January 1, 2019, sections 667, subdivision (a) and 1385, subdivision (b), allow a trial court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 971.) Under the prior version of section 667, subdivision (a), the court was required to impose a five-year consecutive term for prior serious felony convictions and had no discretion to strike any prior conviction of a serious felony for purposes of enhancement of a sentence. (*Garcia*, at p. 971.) The People concede, and we agree, that the amendment applies to defendant as his case is not final. (*Id*. at pp. 972-973 [S.B. 1393 applies retroactively to all cases not yet final on the effective date].) Accordingly, we vacate defendant's sentence and remand this matter to allow the trial court to exercise its discretion to strike or impose the prior serious felony enhancement.

DISPOSITION

The judgment of conviction is affirmed. The sentence is vacated and the matter is remanded for the limited purpose of allowing the trial court to exercise its discretion with respect to S.B. 1393.

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MILLER
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.